he gave me such short notice that it will be impossible for me to lay before you, as some of my brilliant predecessors have done, the results of an historical study extending from the pyramids of Egypt to the detention pens of Ellis Island; and I shall, therefore, be obliged to limit myself to a brief and somewhat fragmentary consideration of this branch of international law as it exists to-day.

ADDRESS OF MR. HOWARD THAYER KINGSBURY, OF NEW YORK CITY,

ON

The Right of a Government to Impose Burdens and Limitations Upon the Alien for Governmental Purposes, that is, for the Benefit of the Community as a Whole.

This somewhat formidable title may be condensed into one comparatively short question: How far may an alien be compelled to contribute, with his property and with his person, to the support of another government?

It may be premised that this discussion deals only with the alien having a residence of a more or less permanent character and has nothing to do with the mere traveller, who, as a general rule, merely owes to the countries, through which he passes, obedience to their police regulations, and who does not otherwise submit himself to their jurisdiction.

Another proper limitation of the subject is the exclusion of situations which may arise in times of extraordinary emergency, such as "plague, pestilence and famine," earthquake or conflagration. Then the law of necessity must override all other laws, national or international, and it is hardly conceivable that any measures taken in good faith by the powers actually exercising control, which are reasonably appropriate to the situation and not wholly repugnant to the usual standards of civilization, would be deemed to give just cause of international complaint, especially if aliens and citizens were treated with substantial equality. In such circumstances, "hard cases" need not make "bad law," since such situations should be and usually are recognized as falling outside of the sphere of law

altogether. In like manner, whatever may take place in the track of war is outside of this particular field of discussion. Aliens and citizens alike come under the power of the actual commander, subject only to the accepted laws of war and to the general rule that there should be no unreasonable discrimination against aliens.

The discussion is thus limited to the position of an alien resident in normal conditions. What duties of personal service and pecuniary support does he owe to the country of his residence and what can that country properly require of him by compulsory process? Obviously he owes some such duties since he has chosen voluntarily to place himself under the jurisdiction and power of the government in control. On the other hand, since he is not a factor in its political organization and has no voice in the conduct of its affairs, it may well be that his obligations toward it should not be measured by the same standard as the obligations of a citizen.

Four classes of possible service and support principally suggest themselves for discussion: (1) taxes; (2) forced loans; (3) military service; (4) service in civil functions.

I. TAXES.

In regard to the taxes which may properly be exacted of aliens, there is, under present conditions of civilization, little occasion for controversy. Taxation imposed upon the ownership or use of tangible property is quite unaffected by the citizenship of the owner, user or occupant, and obviously must be borne by alien and citizen alike. If, under the legal system of any particular country, an alien is regarded as generally incapable of taking or holding a particular kind of property, as, for example, real estate, or of acquiring property in any particular manner, as, for example, by bequest or inheritance, there seems to be no reason, so far as international law is concerned, why a discriminatory tax may not be imposed upon the alien as a condition of allowing him to take or hold the property. An illustration of this may be found in certain legislation of Louisiana, imposing a tax of 10 per cent. upon the value of all property in that State, inherited by any person not domiciliated there and not being a citizen of any State or Territory of the United States. It does

not appear that this tax was ever questioned as contrary to any principles of international law, and its validity was sustained by the United States Supreme Court in *Mager* v. *Grima* (8 How. 490), and *Prevost* v. *Greneaux* (19 How. 1). In the latter case there was also considered the effect of certain provisions of a treaty with France which had become effective after the death of the decedent in question, but before the actual payment of the tax, and the court held that the right of the State to collect the tax was unaffected by the subsequent negotiation of the treaty. It appears that the State courts of Louisiana held that inheritances which vested after the treaty went into effect were governed by its provisions, but the opinion of Chief Justice Taney in the case just cited indicates that he considered that the State courts would have been at liberty to hold otherwise. That tax, it is true, applied to *non-resident* aliens, but the crucial point appears to have been the alienage, rather than the non-residence.

Special taxes of this nature may properly be regarded as a survival in modified and attenuated form of the ancient "Droit d'Aubaine" once very generally recognized and applied, but now obsolescent, as inconsistent with the unifying forces of modern civilization.

In like manner, taxation in the nature of excise upon particular commodities, transactions, facilities and occupations falls ordinarily upon alien and citizen alike. Here, too, discrimination may no doubt be practiced as a condition of relief from any otherwise existing disability. In this country such discrimination would probably be deemed to violate the constitutional inhibition against denial of the equal protection of the laws, but the precise scope of this prohibition presents a question of constitutional rather than international law. The tendency of international law is doubtless to procure for resident aliens the equal protection of the laws, at least so far as civil rights are concerned, but it has not yet reached the point of establishing the proposition that an alien is entitled to entire freedom from discrimination.

Taxation upon incomes usually and properly depends upon residence rather than citizenship, and there seems to be no reason for any discrimination in this respect in favor of or against a resident

alien. Difficult and doubtful questions may well arise as to just what constitutes residence for the purpose of such taxation, as, for example, in a case which has recently received considerable attention in the public press, where an American citizen who had lived for several years on board his own yacht, permanently anchored in a British harbor, was held liable to pay the British income tax as a resident.

Whether, irrespective of constitutional restrictions, a heavier rate of income taxation can properly be levied upon alien than upon citizen residents is somewhat doubtful. Sometimes the local law does not permit an alien to take up a definite residence except upon compliance with special legal requirements, as, for instance, the obtaining of a *permis de séjour,* for which undoubtedly a special tax may be imposed. If this is proper, and the practice is apparently unquestioned, there seems to be no reason why a special income tax, higher in rate than that levied upon citizens, may not be imposed upon alien residents as a further condition of allowing their residence to continue.

Where the local law permits aliens once duly and finally admitted into the country to reside there as and where they choose, it would apparently be contrary to the spirit of modern institutions to subject them to discriminatory taxation, but the very fact that treaties[1] frequently contain clauses specifically providing against any such discrimination, seems a sufficient indication that, in itself, discriminatory taxation of aliens is not contrary to international law. On the other hand, so far as an alien's person or property is within the effectual jurisdiction and control of the country in which he has elected to reside, he certainly has no just grounds to ask or expect any discrimination in his favor in the matter of taxation. He has voluntarily placed his person and his property under the protection of such country, thus increasing to that extent its burden of maintaining social order and organized government, and he surely owes to that country the duty of proportionate contribution to its regular governmental expenses.

[1] See treaties of United States with Argentine Republic, etc., *infra.*

In regard to taxation, then, the following propositions appear to be generally recognized and established:

(a) A resident alien may always be taxed in the same manner and to the same extent as a citizen.

(b) An alien may be subject to special taxation as a condition of relief from disabilities.

(c) In the absence of pre-existing recognized disabilities, aliens should not, in general, be discriminated against in matters of taxation, but

(d) Discriminatory taxation against aliens is not, in itself, contrary to international law.

II. FORCED LOANS.

In thoroughly stable modern governments, forced loans are practically unknown and there is comparatively little modern material on this branch of the subject. A "forced loan" may be defined as an extraordinary governmental exaction of money or supplies taken without the consent of the owner, but with a declared intention of repayment. It is analogous to a military requisition of supplies or to the practice known as "commandeering." As a war measure, it is recognized as legitimate and frequently necessary, but as a civil process it does not enter into the usual scheme of modern civilized government. Inherently, it may be regarded as one form of the exercise of the power of eminent domain, subject to which all property is held by aliens and citizens alike. If a government has the right and power to take over the absolute ownership of property, subject only to the limitations of its own law as to the payment of compensation, it would apparently have an equal right to take over the temporary use of property subject to a corresponding duty to pay proper compensation for such use. Where such a course is followed under due forms of law, in good faith, without violation of treaty provisions, without discrimination against aliens, and with some reasonable provision for repayment, there would seem to be no cause for international complaint; but where, under the guise of a forced loan, an alien's property is, in effect, confiscated, or the so-called "loan" is exacted by violence or illegal force, then the coun-

try so offending is properly subject to international pressure to enforce reparation.

A number of cases of this nature arising in Mexico were submitted to arbitration under the Convention of 1868 and were decided by Sir Edward Thornton, the umpire, substantially according to the principles above outlined.[2]

It is quite usual to provide by treaty that the citizens of each of the contracting parties shall not be liable to forced loans in the other country. Such a provision is found in the present treaties of the United States with the Argentine Republic, Costa Rica, Haiti, Honduras, Italy, the Congo, Nicaragua, Paraguay, Servia and Tonga.

III. MILITARY SERVICE.

This presents, perhaps, the most difficult and least settled phase of this general question. The view is sometimes taken that military service pertains to the purely political side of government and has nothing to do with its general civil organization; that an alien owes civil duties to the country in which he resides, but not political, since he has, in general, no political rights, and that therefore compulsory military service should not be required of him. This view is supported by the practical argument that an alien rendering compulsory military service might be thus required to join in hostile operations against his own country, to which he still owed allegiance, a situation the evils of which to all concerned do not require elaboration. Bluntschli takes this view and summarizes it very concisely in his codification of international law as follows:

> Section 391. Foreigners cannot be required to perform military service. Exception may be made to this rule in cases of necessity to defend a locality against brigands or savages.

The general practice of the countries upon the continent of Europe, in most of which compulsory military service prevails, is in accordance with this view, that aliens are not subject to conscription, but in the common law countries, where civil rights and obligations are

[2] Moore's International Arbitrations, Vol. IV, pp. 3411, 3424.

determined by domicile rather than nationality, and where military service has thus far been usually voluntary and not compulsory, a different rule prevails, and both England and the United States apparently recognize that military service may be required of an alien (especially one who has declared his intention of becoming a citizen, or has voted at a State election), without violating international law. Needless to say, this question has rarely arisen, and when it did arise in connection with the "draft" in this country during the Civil War, it was usually adjusted with forbearance on both sides. The United States Government claimed that aliens who had exercised any political rights, such as were permitted by the laws of various States, should be deemed subject to conscription; and the Conscription Act of 1863 was made expressly applicable to "all persons of foreign birth who shall have declared on oath their intention of becoming citizens." This seems reasonable enough in itself, but even in the case of such persons, it was arranged through diplomatic channels that they should have a certain limited time (65 days) in which to leave the country if they desired to do so, thus escaping the military service that might otherwise be required of them. The British Government expressly declined to interfere in favor of intended citizens who did not avail themselves of this opportunity.

It is stated that, during the Civil War, as a matter of fact, "there was not a single instance in which an alien was held to military duty when his government called for his release." [3]

At an earlier and less friendly period, however, the activities of the British press gang, especially upon American sailors, furnished one of the causes of irritation which led to the War of 1812 and the question was by no means settled, in theory, by the result of the war. It is not even mentioned in the Treaty of Ghent.

The position of this government on this question has undergone considerable modification. In 1804 Mr. Madison, as Secretary of State, wrote to Mr. Monroe, Minister to England: "Citizens or subjects of one country, residing in another, * * * can never be rightfully forced into military service." But in 1868, Mr. Seward wrote:

[3] Mr. Bayard, Moore's Dig., Vol. IV, p. 55.

This Government is not disposed to draw in question the right of a nation in case of extreme necessity, to enroll in the military forces all persons within its territories, whether citizens or domiciled foreigners.

And Mr. Fish in 1869:

This government, though waiving the exercise of the right to require military service from all foreigners, has never surrendered that right, and cannot object if other governments insist upon it.[4]

It may be assumed that where a particular exemption from liability to public burdens is often, but by no means always, expressly provided for by treaty, the liability would be deemed to exist in the absence of the specific exemption. This conclusion is strengthened when the exemption is often made expressly applicable to consular officers only, whose residence is official, and not to alien residents generally. Of the United States treaties now in force, the following provide for a general exemption from compulsory military service:

Argentine Republic,
Costa Rica,
Haiti,
Italy,
The Congo,
Nicaragua,
Paraguay,
Servia,
Spain,
Switzerland, and
Tonga.

And the following for such an exemption in favor of consular officers only:

Austria,
Belgium,
Brazil,
Colombia,
Denmark,
France,
German Empire,
Greece,
Netherlands, and
Roumania.

The provision in the Treaty of 1853 with the Argentine Republic may be taken as a good example of the first class and also as illustrating certain other treaty exemptions pertinent to this discussion:

[4] Moore's Dig. of Int. Law, Vol. IV, pp. 52, 57.

Art. X. The citizens of the United States residing in the Argentine Confederation, and the citizens of the Argentine Confederation residing in the United States, shall be exempted from all compulsory military service whatsoever, whether by sea or by land, and from all forced loans, requisitions or military exactions; and they shall not be compelled, under any pretext whatever, to pay any ordinary charges, requisitions, or taxes greater than those that are paid by native citizens of the contracting parties respectively.

The provision in the Consular Convention of 1870 with Austria can be taken as a good illustration of the second class:

The consuls-general, consuls, vice consuls, and consular agents, their chancellors and other consular officers, if they are citizens of the state which appoints them, shall be exempt from military billetings, from service in the military or the national guard, and other duties of the same nature and from all direct and personal taxation, whether federal, State or municipal, provided they be not owners of real estate and neither carry on trade nor any industrial business.

If, however, they are not citizens of the state which appoints them, or if they are citizens of the state in which they reside, or if they own property, or engage in any business there that is taxed under any laws of the country, then they shall be subject to the same taxes, charges, and assessments as other private individuals.

They shall, moreover, enjoy personal immunities, except for acts regarded as crimes by the laws of the country in which they reside. If they are engaged in commerce, personal detention can be resorted to in their case, only for commercial liabilities and then, in accordance only with general laws applicable to all persons alike.

The application of these treaty provisions is doubtless further extended by the "most favored nation" clause in other treaties.

It may be inferred from the frequency of these treaty provisions that in the absence of such a stipulation this country does not claim that its citizens are necessarily exempt from military service in a foreign country in which they may reside, and that it reserves the right to require such service of alien residents here upon a sufficient occasion and as a condition of remaining. Such seems to be the latest view of the State Department, as already shown. While this may appear inconsistent on its face with the

Continental practice, it is not wholly incompatible therewith or illogical in itself. It is rather an application of the law of necessity. When a sufficient emergency arises, when the very life of the nation is at stake, then the nation may call upon all of its own citizens and all aliens who choose to remain within its borders and enjoy its protection, but in normal times it requires military service of no one. On the Continent, the reverse is generally true. The normal condition of things there is the requirement of military service, to some extent, of every citizen physically qualified, but only of its own citizens. Thus where compulsory military service is normal, it is also normal not to exact it of aliens, but where compulsory military service is only occasional and abnormal, it does not materially increase its abnormality to include aliens in its requirements.

Since compulsory military service to a foreign country can always be avoided by timely departure from it, there appears to be no reason why, in itself, it should necessarily form any exception to the general rule that a government may, if it chooses, require the same support, whether personal or pecuniary, of aliens whom it permits to reside within its borders, as it requires of its own citizens. Discrimination against aliens is doubtless contrary to the trend of modern civilization, but there is no foundation in international law for requiring discrimination in their favor.

IV. CIVIL DUTIES OF AN OFFICIAL CHARACTER.

In general, alienage is made, by local law, a disqualification for public service of an official character, such as office holding, police functions and jury duty, but in the absence of municipal regulation there is nothing in international law to prevent an alien from rendering or from being required to render such service to the country of his domicile. Here in this city of Washington, which is periodically and at least quadrenially invaded by so eager an army of volunteers for such service, it may seem almost inconceivable that freedom from obligation to hold office should be deemed a desirable exemption and not a disability, but that it sometimes is so regarded is indicated by such a treaty provision as that contained in our Treaty of 1871 with Italy.

Art. III. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.

They shall, however, be exempt in their respective territories, from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia.

They shall likewise be exempt from any judicial or municipal office, and from any contribution whatever in kind or in money, to be levied in compensation for personal services.

Similar provisions are found in the treaties with Servia, Spain and the Congo, and, in regard to consuls only, in the treaties with Brazil, Colombia and Denmark.

A curious and interesting limitation of such exemption is found in the Treaty of 1891 made with the King of the Belgians as sovereign of the Congo Free State:

Art. III. The citizens and inhabitants of each of the high contracting parties shall be exempt, in the territories of the other, from all personal service in the army, navy or militia and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatever, except the obligation of sitting, within a radius of one hundred kilometres from the place of their residence, as a juror in judicial proceedings; furthermore, their property shall not be taken for the public service without an ample and sufficient compensation.

This strikingly illustrates how in this matter, as in nearly all other questions of international or municipal law, general rules and customary arrangements, usually prevailing, must yield to peculiar local conditions and requirements. In the Congo Free State, white men competent to serve on jury are doubtless few and far between and their political allegiance is of little or no importance in the premises. The government is reasonably entitled to exact this service of all actually qualified to perform it, and this obligation, which would probably subsist in the absence of treaty, is therefore expressly excepted from the general exemption which the treaty contains.

In like manner a requirement of service in the local police in

Batavia was considered by our State Department, and while efforts were made for the relief of an American citizen, residing in Batavia, from such service, it was not claimed that the requirement was necessarily violative of international law.[5]

In general and to conclude, it may be said that an alien may properly be required to contribute both with his person and his property to the support of the government, under whose protection he chooses to reside, to the same extent as a citizen; that for political reasons, military service generally should be, and usually is, excepted, and that discriminatory burdens may be imposed upon the alien as a condition of remaining, but not merely by reason of alienage. The modern tendency, as exemplified by municipal law, by unwritten custom and by express treaty, is to put the alien on the same basis with the citizen in respect to all purely civil duties, since he usually enjoys civil rights, but to exempt him from political duties unless and until he acquires political rights by naturalization. Such a course tends to promote international intercourse and thus to advance civilization, the history of which is so largely a history of advances in facilities of intercourse and communication. The progress which has been made in international law in the direction of securing substantial equality of treatment for aliens and citizens is but another illustration of the experimental character of all law; another proof that its underlying philosophy is pragmatic rather than *a priori;* and a further confirmation of the view recently expressed in our highest court that nearly every question of law is, in its last analysis, principally a question of degree, and to be tested by practical concrete results, rather than by a theoretical application of abstract rules of formal logic.

The CHAIRMAN. The question is now open for discussion. Are there any further remarks that any members of the Society desire to make upon it? If not, we will next listen to the report of the committee appointed to draw up resolutions upon the death of Chief Justice Fuller, who unfortunately died since the last annual meeting of the Society.

[5] See Moore's Digest of International Law, Vol. IV, pp. 61–63.